No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

—v.—

STATE OF HAWAII, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented in this case include whether Presidential Proclamation No. 9645, 82 Fed. Reg. 45,161 (the ***Proclamation*** or ***Entry Ban***), issued by the President on September 24, 2017 is a lawful exercise of the President's authority to suspend entry of certain foreign nationals, and whether it violates the Establishment Clause.

This brief presents the Court with an evidence-based analysis regarding the intersection of immigration and national security policy. *Amicus* hopes that this material is useful to the Court when considering the justifications for the Entry Ban.

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute (***Cato***) is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato believes that those values depend on holding government to rigorous standards of evidence and justification for its actions. Toward those ends, Cato conducts conferences, and publishes books and studies.

The Cato Institute and its scholars have significant experience studying immigration law and policy in the United States. The Cato Institute therefore believes that it can assist the Court by providing evidence relevant to the Proclamation and its ban on the entry of certain foreign nationals.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The government claims that the current Presidential Proclamation—the government's third attempt to ban the entry into the United States of certain categories of persons—will help prevent terrorist attacks and other crime in the United States. *Amicus* respectfully disagrees. Cato's original research shows that this justification does not withstand scrutiny.

The Court may consider real-world evidence about the Proclamation's stated justifications and

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[1] No party's counsel authored any part of this brief, and no person other than *amicus* funded its preparation and submission. Petitioners have provided blanket consent for the filing of *amicus curiae* briefs, and Respondents have provided their written consent to the filing of this brief.

effects because such evidence bears on the prevailing legal tests governing the claims in this case.

First, the threshold inquiry for claims under the Immigration and Nationality Act (***INA***) concerns whether the President made an adequate finding to justify the Entry Ban. Part II shows that the Proclamation's restrictions are unsupported both by the Proclamation's stated rationale and by evidence about terrorism and public-safety threats posed by the nationals of the countries targeted by the Entry Ban.

Second, with respect to the Constitutional claims, Cato's research is relevant under the legal tests that both Petitioners and Respondents advance. Under the government's view that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), governs, it is appropriate for the Court to probe whether there is a "bona fide reason" for the exclusion (Br. for Petitioners at 16, 58 (quoting *Mandel*, 408 U.S. at 770)) and to consider whether the government "rationally could have believed" in the stated purposes for the exclusion (*Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-72 (1981)).

Furthermore, under established precedent, the threshold inquiries for Establishment Clause, Equal Protection Clause, and Religious Freedom Restoration Act (***RFRA***) challenges to government actions require courts to decide whether those actions are motivated by a sincere permissible purpose. If government actions fail that threshold inquiry, then prevailing authority requires courts to subject the actions to heightened scrutiny, which requires courts to consider evidence about whether the actions are

appropriate means to advance the government's interests.

In short, the government bears an initial burden of showing that its action reflects a sincerely held, rational, and permissible basis. *See* Part I.

As is relevant to the Court's analysis, Cato's original research undermines the government's stated justifications in at least three ways:

(1) First, the Entry Ban denies visas to nationals of six Muslim-majority countries (Chad, Iran, Libya, Somalia, Syria, and Yemen), as well as all nationals of North Korea and some government officials from Venezuela (the ***Designated Countries***) with the stated justification that the ban is necessary because certain governments fail to share sufficient information to allow consular officials to vet nationals of those countries before entry. Yet consular officers already deny visas—as the law requires—to all applicants, including from the Designated Countries, who fail to prove their eligibility.

(2) Second, the Proclamation claims that the government arrived at this list of countries by applying certain stated criteria, but it fails to apply its stated requirements consistently, leaving out dozens of countries that fail to meet the criteria.

(3) Finally, the Proclamation's assertion that the failures of the Designated Countries have made their nationals more dangerous than others is also without basis. The Entry Ban would not have prevented the entry of any person convicted of carrying out (or killed

while committing) a terrorist attack since 9/11 (and, of course, the 9/11 hijackers were not nationals of the Designated Countries); moreover, not a single person from these countries has killed anyone in a terrorist attack in the United States in over four decades. Nationals of the Designated Countries have also been much less likely to commit other serious crimes than U.S.-born persons or other foreign nationals.

ARGUMENT

I. THE CATO INSTITUTE'S ORIGINAL IMMIGRATION RESEARCH IS MATERIAL TO KEY LEGAL QUESTIONS IN THIS CASE

The Court should consider evidence of the Proclamation's actual purpose and effects because the legal tests in this case require it. The various plaintiffs in this case challenging the Proclamation under statutory grounds, the Establishment Clause, and the Equal Protection Clause, have successfully obtained an injunction against the Proclamation.[2]

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[2] The Ninth Circuit upheld the injunction on statutory grounds (specifically, the INA, 8 U.S.C. §§ 1152(a)(1)(A), 1182(f)). Nevertheless, Establishment Clause, Equal Protection, and RFRA arguments remain relevant because the Court may affirm the decision below on any grounds in the record, including those upon which the lower court did not rely. *U.S. v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) ("[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."). Further, the Court has also considered arguments not pursued by the respondents, but rather argued by an *amicus curiae*. *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961).

The prevailing doctrines governing these claims and the review of preliminary injunctions all require courts to consider real-world evidence about some combination of the justifications, purposes, operation, or effects of the government actions being challenged.[3]

Beginning with the statutory arguments, the Court must look at whether the President has made a finding sufficient to support the Entry Ban; if not, the President has exceeded the scope of his delegated authority under the INA. *See Hawaii v. Trump*, 878 F.3d 662, 672 (9th Cir. 2017). INA's section 212(f), codified at 8 U.S.C. § 1182(f), requires that the Entry Ban must be supported by a "*find[ing]* that the entry of . . . any class of aliens into the United States would be detrimental to the interests of the United States" (emphasis added). The President must, therefore, "base his decision on some fact, not on mere opinion or guesses." *Hawaii*, 878 F.3d at 692 (citing 87 Cong. Rec. 5051 (1941) (statements of Rep. Jonkman and Rep. Jenkins)) (internal quotations omitted). *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (in cases where a statute requires "findings," courts may inquire into whether a "rational connection [exists] between the facts found and the [regulatory] choice made"). Thus, section 1182(f) requires that the President provide "(1) findings that support the conclusion that admission of the excluded aliens would be detrimental, and (2) the harm the President identifies must amount to a detriment to the interests of the

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[3] The Cato Institute takes no position on whether the present case triggers the doctrines above, or whether the prevailing doctrinal tests are correct.

United States." *Hawaii*, 878 F.3d at 693 (internal quotations omitted).

The evidence presented by Cato in Part II.A demonstrates that the Proclamation's restrictions are inconsistent with the Proclamation's stated bases; in other words, the Proclamation's application of its stated criteria does not support the list of Designated Countries. Moreover, the evidence presented by Cato in Parts II.B-D demonstrates that the Proclamation's broad restrictions are unnecessary: individualized visa screening procedures already identify and effectively prevent dangerous individuals from entering the United States, and there is no documented connection between the Designated Countries' nationals and terrorism or public-safety threats. Cato's data are therefore relevant to whether the Proclamation includes an adequate, fact-based finding that entry by such nationals would be detrimental to the interests of the United States.

Turning to the Constitutional claims, even under the government's view that *Mandel* governs this Court's assessment, that case would require the Court to probe whether there is a "bona fide reason" for the exclusion of certain foreign nationals (Br. for Petitioners at 16, 58 (quoting *Mandel*, 408 U.S. at 770)), and to consider whether the government "rationally could have believed" in the purposes for that exclusion (*Western & S. Life Ins. Co.*, 451 U.S. at 671-72 (1981)). Thus, even under that deferential standard of review, the Court still must determine whether the government's stated reason for its action may be credited.

Under prevailing Establishment Clause doctrine, this Court must evaluate the authenticity of the

government's articulated secular purpose.[4] The Establishment Clause "'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs,'" even in facially neutral laws. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971) and *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Courts applying the prevailing Establishment Clause test therefore must evaluate evidence about whether a government measure is motivated by a "secular purpose" that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. ACLU*, 545 U.S. 844, 864 (2005). To do so, courts probe the operation of the government action, as "the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye*, 508 U.S. at 535. And when the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action," such action is impermissible. *McCreary Cty.*, 545 U.S. at 863.

Here, the government justifies the Proclamation by asserting the need to "protect [U.S.] citizens from terrorist attacks and other public-safety threats" by detecting "foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat" and preventing "such individuals from entering the United States." Proclamation § 1(a). Cato's research, as set forth below, undermines that

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[4] The Fourth Circuit recently upheld a preliminary injunction against the Proclamation on Establishment Clause grounds. *See IRAP v. Trump*, 883 F.3d 233, 238-84, 310-14 (4th Cir. Feb. 28, 2018).

justification. That evidence therefore bears on the Establishment Clause analysis.

Moreover, this Court has held that government actions that discriminate among religions require application of strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982). Strict scrutiny requires consideration of whether government action furthers a compelling government interest and whether the action is narrowly tailored to that interest. *Id.* at 246-47; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Critical to the inquiry is whether the government action "visits 'gratuitous restrictions'" that are unwarranted by the government's claimed interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 538 (quoting *McGowan v. Maryland*, 366 U.S. 420, 520 (1961) (opinion of Frankfurter, J.)). Where government action imposes such overinclusive restrictions, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that [such] a law . . . seeks not to effectuate the stated governmental interests," but rather to advance impermissible purposes. *Id.*; *see also Larson*, 456 U.S. at 248 ("Appellants must demonstrate that the challenged . . . rule is closely fitted to further the interest that it assertedly serves."). On the other hand, when a government action is materially *under*inclusive by failing to restrict activities "that endanger[] [the government's] interests in a similar or greater degree than" those activities that the action does restrict, the government undermines its claim that it is pursuing a compelling interest and raises the specter that the government is using its stated objective to pursue prohibited discrimination. *Church of Lukumi Babalu Aye*, 508 U.S. at 543. To assess whether a government action's purported

purpose is genuine, both law and common sense require courts to consider the extent to which the government has failed to take less-restrictive actions that would further its purpose. *See, e.g., id.* at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J. concurring in part and concurring in judgment)); *Florida Star*, 491 U.S. at 540 ("[T]he facial underinclusiveness of [the statute] raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of [the statute]."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (holding a law limiting signage as impermissible under the First Amendment because it left other threats to the town's asserted interests unprohibited).

Similar doctrines apply, with variations not relevant here, to the Equal Protection and RFRA challenges to the Proclamation. *See Adarand Constructors*, 515 U.S. at 227 (as to equal protection under the Fifth Amendment); 42 U.S.C. § 2000bb–1; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (as to RFRA). The RFRA governs actions that place burdens on the exercise of religion, 42 U.S.C. § 2000bb–1; the Equal Protection doctrine governs government action that draws distinctions based on suspect classifications such as race, religion, or alienage, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Where such distinctions exist, a court may engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev.*

Corp., 429 U.S. 252, 266 (1977); *see also Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985).

In summary, the Proclamation must be supported by a bona fide, rational belief and neutral purpose, and be neither over- nor underinclusive. The evidence presented by Cato in Part II demonstrates a complete disconnect between the stated purpose of the Proclamation and its actual operation and effects, bringing into question what interest the Entry Ban may actually serve. In particular, Part II.A shows that the Proclamation is internally inconsistent: the criteria upon which the Proclamation purports to rely cannot explain the Entry Ban. Parts II.B to II.D show that the Entry Ban is based on a false premise, would not have prevented the entry into the U.S. of any terrorists since 9/11, and that nationals from the Designated Countries have not committed any deadly terrorist acts on U.S. soil.

II. THE CATO INSTITUTE'S ORIGINAL RESEARCH SUGGESTS THAT THE PROCLAMATION'S RESTRICTIONS ARE INCONSISTENT WITH THE GOVERNMENT'S STATED BASIS FOR THOSE RESTRICTIONS

A. The Proclamation's Criteria Do Not Actually Explain the Government's Selection of Designated Countries.

Although the government asserts that the Proclamation safeguards the United States against terrorism by placing visa restrictions on nationals of certain designated countries, this explanation does not withstand scrutiny. The government claims that the Department of Homeland Security (***DHS***), with the Department of State, used a set of "neutral,"

"baseline" criteria (the ***Baseline Criteria***) to measure "all foreign governments," in a "worldwide, multi-agency review process." Proclamation § 1(c); Br. for Petitioners at 60. The government contends that all countries deemed inadequate against the "neutral" Baseline Criteria, with the exception of Iraq, were included on the list of Designated Countries. Proclamation § 1(g); Br. for Petitioners at 60. These claims are inaccurate. The government did not apply—or did not neutrally apply—the Baseline Criteria to every country in the world, undercutting the stated justification for the visa restrictions and the selection of these individual countries.

According to the Proclamation, the Baseline Criteria were split into three categories:

> (1) Identity-management information, *i.e.*, "whether the country issues electronic passports embedded with data to enable confirmation of identity [***Criterion 1***], reports lost and stolen passports to appropriate entities [***Criterion 2***], and makes available upon request identity-related information not included in its passports [***Criterion 3***]." Proclamation § 1(c)(i).
>
> (2) National security and public-safety information, *i.e.*, "whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request [***Criterion 4***], whether the country provides passport and national-identity document exemplars [***Criterion 5***], and whether the country impedes the United States Government's receipt of information about passengers and

crew traveling to the United States [***Criterion 6***]." Proclamation § 1(c)(ii).

(3) National security and public-safety risk assessment, *i.e.*, "whether the country is a known or potential terrorist safe haven [***Criterion 7***], whether it is a participant in the Visa Waiver Program [***Criterion 8***] . . . and whether it regularly fails to receive its nationals subject to final orders of removal from the United States [***Criterion 9***]." Proclamation § 1(c)(iii).

These Baseline Criteria do not explain the Designated Countries list because the list both includes countries that satisfied the Baseline Criteria (*see* subpart 1) and excludes countries that did not satisfy these criteria (*see* subpart 2).

1. The Government Included Countries That, Under Its Stated Criteria, Should Not Have Been Designated.

The government's Baseline Criteria prove too little: they do not explain the inclusion of most countries designated in the Entry Ban. The criteria cannot, therefore, be considered the real reason for the ban on nationals of those countries. For instance:

(a) Chad is included on the list in part because "several terrorist groups are active within Chad or in the surrounding region." Proclamation § 2(a)(i). However, the Baseline Criteria do not include "terrorist groups . . . in the surrounding region" as a criterion. Rather, under Criterion 7, a country must be a "known or potential terrorist safe haven." Proclamation § 1(c)(iii). The Department of State acknowledges that Chad is not a

terrorist safe haven, nor has it ever been one;[5] yet it is included among the Designated Countries.

(b) Iran and Syria are included on the list of Designated Countries in part because they are "the source of significant terrorist threats, and [are] state sponsor[s] of terrorism." Proclamation §§ 2(b)(i), (e)(i). However, no criterion asks whether a county is a "source of significant terrorist threats." In addition, being a state sponsor of terrorism is not a Baseline criterion despite being applied to both Iran and Syria. *If* it were a criterion, Sudan would be a necessary addition to the list of Designated Countries.[6]

(c) The Proclamation faults Libya and Venezuela for not being "fully" cooperative with respect to Criterion 9, concerning accepting deportees from the United States. Proclamation §§ 2(c)(i), (f)(i). However, the reported standard under the Baseline Criteria asks not whether each country is "fully" cooperative, but "whether [each country] *regularly* fails to receive its nationals subject to final orders of removal from the United States." Proclamation § 1(c)(iii) (emphasis added). Yet when the September 2017

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[5] U.S. Dep't of State, *Country Reports on Terrorism 2016*, 313-22 (July 2017), https://www.state.gov/documents/organization/272488.pdf (listing terrorist safe havens, but not including Chad) (***Dep't of State*, 2016 Terrorism Report**).

[6] Dep't of State, ***2016 Terrorism Report*** at 303-06; U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Mar. 22, 2018).

Proclamation was signed, the Immigration and Customs Enforcement agency (***ICE***) did not label either Libya or Venezuela as one of the twelve most "recalcitrant" countries in accepting deportees from the U.S.[7] Of the Designated Countries, ICE only described Iran as "recalcitrant."[8] In September 2017, just days before the Presidential Proclamation, DHS went so far as to sanction four countries for their failure to accept U.S. deportees, but none of those four are on the government's Designated Countries list.[9] Here too it is inescapable that the Baseline Criteria as described in section 1 of the Proclamation do not provide a basis for the justifications enumerated in section 2.

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[7] Arshad Mohammed & Yeganeh Torbati, *U.S. will not issue some visas in 4 nations in deportation crackdown*, REUTERS (Sept. 20, 2017), https://www.reuters.com/article/legal-us-usa-immigration-visas/u-s-will-not-issue-some-visas-in-4-nations-in-deportation-crackdown-idUSKCN1BO1YR (***Mohammed & Torbati, Deportation Crackdown***).

[8] *Id.*

[9] Those countries were Cambodia, Eritrea, Guinea, and Sierra Leone. U.S. Dep't of Homeland Sec., *DHS Announces Implementation of Visa Sanctions on Four Countries* (Sept. 13, 2017), https://www.dhs.gov/news/2017/09/13/dhs-announces-implementation-visa-sanctions-four-countries (***Dep't of Homeland Sec.*, Visa Sanctions**). As of December 2017, ICE's list of nine "recalcitrant" counties still does not include Venezuela or Libya, and eight of those nine listed countries are not subject to the Proclamation (Iran is the exception). Aline Barros, *Trump Administration Strikes Multiple Deportation Deals; What's in Them?*, VOA NEWS (Mar. 3, 2018) https://www.voanews.com/a/trump-administration-multiple-deportation-pacts/4279219.html.

Therefore, by its own terms, the inclusion of at least five of the seven countries that were "inadequate" under the Baseline Criteria (Chad, Iran, Libya, Syria, and Venezuela) is not explained by the standards articulated in the Proclamation.[10]

Indeed, the Proclamation also designates Somalia while recognizing that it is not "inadequate" under the Baseline Criteria. Proclamation §§ 1(i), 2(h). Although Somalia issues an electronic passport—and therefore passes Criterion 1—it is nevertheless designated in part because "the United States and many other countries do not recognize" its passport.[11] Proclamation § 2(h)(i). This more stringent

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[10] Although the Proclamation states that the President considered other factors, such as "each country's capacity, ability, and willingness to cooperate with [U.S.] identity-management and information-sharing policies . . . whether [each country] has a significant terrorist presence within its territory [and] foreign policy, national security, and counterterrorism goals," Proclamation § 1(h)(i), these were explicitly *not* the criteria relied on in the initial selection of the Designated Countries by the Secretary of Homeland Security. *See* Proclamation § 1(c). In addition, these factors did not alter the final choice of Designated Countries. *See* Proclamation §§ 1(g)-(i).

[11] *Amicus* understands this reference in the Proclamation to be to the fact that Somalia is not a participant in ICAO's Public Key Directory—a repository used to ensure the validity and integrity of electronic passports. *See* ICAO, *ICAO PKD*, https://icao.int/Security/FAL/PKD/Pages/default.aspx (last visited Mar. 21, 2018); Canice Leung, *EXCLUSIVE: U.S. Demands Nations Provide More Traveler Data Or Face Sanctions*, REUTERS (July 13, 2017), http://live.reuters.com/Event/Live_US_Politics/1012197528 (last visited Mar. 21, 2018) (reproducing the July 12, 2017 Department of State cable showing that the government's concern when drafting the Proclamation was participation in ICAO's PKD for electronic passports).

requirement is not the Baseline standard under Criterion 1. In addition, although Somalia "satisfies the information-sharing requirements of the baseline," its "lack of territorial control . . . compromises Somalia's ability . . . to share." *Id.* In other words, the Proclamation holds Somalia to a different standard than it does other countries. The Proclamation alters its standards of inclusion specifically to apply to Somalia.

Accordingly, the Proclamation's stated criteria do not explain which countries became the Designated Countries, and which did not.[12]

2. The Government Omitted Countries That, Under Its Stated Criteria, Should Have Been Designated.

The Proclamation's Baseline Criteria also prove too much: the Proclamation omits a large number of countries from the banned list despite those countries failing one or more Baseline Criteria. The Proclamation itself concedes that Iraq failed the Baseline Criteria, but it is nonetheless excluded from the Designated Countries list. Proclamation § 1(g). But Iraq is not alone:

(a) *Criterion 1.* In 2017, 82 non-Designated Countries failed the requirement to use electronic passports, and many other countries allow their nationals to travel under older non-electronic passports.[13]

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[12] Nevertheless, the government has taken the position that "the validity of the Proclamation rises or falls on the rationale presented within its four corners." *See IRAP*, 883 F.3d at 252.

[13] *See* David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, Cato Institute: Cato at Liberty (Oct. 9, 2017), https://www.cato.org/blog/travel-ban-based-executive-whim-not-

(b) *Criterion 2.* At least 16 countries never report lost and stolen passport information,[14] and DHS has warned that, outside Canada and Europe, an "alarming number of countries . . . report very little."[15] Indeed, three of the four most populous countries in the world—China, India, and Indonesia—rarely or never reported this data.[16]

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objective-criteria. Despite its goal to "encourage foreign governments to improve their . . . identity-management protocols and practices," Proclamation § 1(b), none of those Designated Countries that did not use an internationally recognized electronic passport before the Proclamation now do so. *See* International Civil Aviation Organization (***ICAO***), *ICAO PKD Participants*, https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx (last visited Mar. 21, 2018) (showing that of the countries participating in the ICAO's Public Key Directory (***PKD***) standards for passports, only Panama and the European Union have joined since the Proclamation was issued).

[14] *See* U.S. Dep't of Homeland Sec., *Written testimony of PLCY Office of International Affairs Assistant Secretary and Chief Diplomatic Officer Alan Bersin and CBP Office of Field Operations Acting Deputy Assistant Commissioner John Wagner for a House Committee on Homeland Security, Subcommittee on Border and Maritime Security hearing titled "Passport Fraud: An International Vulnerability"* (Apr. 4, 2014), https://www.dhs.gov/news/2014/04/04/written-testimony-plcy-office-international-affairs-and-cbp-office-field-operations (***Bersin Testimony***) (showing that the U.S. relies on INTERPOL's Stolen and Lost Travel Documents (***SLTD***) database, and that Interpol has 190 member countries); INTERPOL, *Stolen and Lost Travel Documents database*, https://www.interpol.int/INTERPOL-expertise/Border-management/SLTD-Database (showing that the SLTD database is populated by only 174 countries) (last visited Mar. 9, 2018).

[15] Bersin Testimony.

[16] *Id.*

(c) *Criterion 7.* In 2017, the State Department identified 13 terrorist safe havens—the focus of Criterion 7—but the Proclamation did not include nine of these as Designated Countries.[17]

(d) *Criterion 9.* This criterion addresses countries that "regularly" refuse to accept U.S. deportees. However, although ICE maintains a list of counties which are "recalcitrant" in receiving deportees from the U.S., only one country (Iran) out of the 12 countries identified by ICE before the September 2017 Proclamation became a Designated Country.[18] Moreover, in September 2017, the United States sanctioned four countries for refusing to accept deportees, but, again, none became Designated Countries.[19]

In short, if the government applied the Baseline Criteria neutrally and objectively, it would have had to include a far greater number of countries on the

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[17] *See* Dep't of State, ***2016 Terrorism Report*** at 313-22.

[18] Those countries are China, Cuba, Vietnam, Laos, Iran, Cambodia, Burma, Morocco, Hong Kong, South Sudan, Guinea and Eritrea. Mohammed & Torbati, *Deportation Crackdown*. As of December 2017, ICE deemed nine countries as recalcitrant, but still only one (Iran) is a Designated Country. Aline Barros, *Trump Administration Strikes Multiple Deportation Deals; What's in Them?*, VOA NEWS (Mar. 3, 2018), https://www.voanews.com/a/trump-administration-multiple-deportation-pacts/4279219.html.

[19] Those countries were Cambodia, Eritrea, Guinea, and Sierra Leone. Dep't of Homeland Sec., *Visa Sanctions*.

Designated Countries list than it did.[20] The only explanation as to why these various countries are not included is that the government did not actually generate the Designated Countries list based on the Baseline Criteria, or did not apply the Baseline Criteria neutrally.

The government's failure to include many countries on the list of Designated Countries is even less rational if one considers not the government's stated criteria, but the actual criteria that it applied to include Iran, Syria, Chad, and Somalia on the list. For example:

(a) The government included Somalia as a Designated Country in part because many "countries do not recognize" its electronic passport.[21] Proclamation § 2(h)(i). But only 58 countries meet this standard,[22] so if the government applied this criterion

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[20] The Proclamation actually states that sixteen countries were found to be "inadequate" when assessed against these Baseline Criteria. However, after several countries provided passport exemplars or agreed to share information on known or suspected terrorists, the Secretary of Homeland Security ultimately recommended to the President—and the President agreed—that only seven of these countries be included on the list of Designated Countries. Proclamation §§ 1(e)-(h). Those passport exemplars and agreements in no way address whether those otherwise "inadequate" countries still fail to use electronic passports, report lost or stolen passport information, provide safe havens for terrorists, or regularly refuse to accept deportees from the U.S.

[21] *See* n. 11, *supra*.

[22] *See* ICAO, *ICAO PKD Participants*, https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx (last visited Mar. 21, 2018) (showing that 58 countries and the United Nations and European Union participate in the ICAO's PKD for electronic passports).

consistently to the nearly 200 countries that it claims to have reviewed it would have designated approximately 140 countries.[23]

(b) Somalia was also added to the Designated Countries list in part because it lacks "territorial control." Proclamation § 2(h)(i). If the government applied this unstated "territorial control" criterion consistently the number of Designated Countries would increase by at least nine.[24]

(c) The government included Iran and Syria in part because they are state sponsors of terrorism. Proclamation §§ 2(b)(i), (e)(i). But Sudan—also a state sponsor of terrorism—was excluded without explanation.[25]

(d) The government designated Chad in part because terrorists are "active within [the country] or the surrounding region." Proclamation § 2(a)(i). However, there are more than 30 other countries that similarly have U.S.-designated Foreign Terrorist

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[23] *See* Proclamation Preamble (showing that "nearly 200 [countries were] evaluated" when designing the Proclamation). *See also* ICAO, ***ICAO ePassport Issuing States Participants in Public Key Directory (PKD)***, http://gis.icao.int/epassport/ (last visited Mar. 22, 2018) (showing countries participating in PKD, and those who issue electronic passports without PKD).

[24] This number is calculated by counting the thirteen State Department designated terrorist safe havens, and subtracting those countries already included among the Designated Countries (Libya, Somalia, Venezuela, and Yemen). *See* Dep't of State, ***2016 Terrorism Report*** at 313-22 (defining "terrorist safe haven" to include countries with "ungoverned, under-governed, or ill-governed physical areas").

[25] *See* Dep't of State, ***2016 Terrorism Report*** at 303-06.

> Organizations operating inside their borders but which are not Designated Countries, including countries such as France, India, Spain, and the United Kingdom.[26]

The government has argued that the validity of the Proclamation will "rise[] or fall[] on the rationale presented within its four corners."[27] Yet, the consistent application of the government's criteria—whether the government's stated criteria or the actual criteria that the government applied—should have produced a very different list of Designated Countries. These criteria cannot, therefore, explain the government's selection of nationals to exclude from entry. Because the Baseline Criteria were not neutrally applied to identify which countries warranted inclusion among the Designated Countries, the Proclamation's purpose cannot be, as the government claims, to "encourage cooperation" with the United States. Proclamation § 1(h)(i); Br. for Petitioners at 60.

B. The Entry Ban is Based on the False Premise That the Government Needs the Cooperation of Foreign Governments to Process Visa Applications.

While the Proclamation came about as the result of a report by the DHS on what "additional information will be needed from each foreign country to adjudicate an application," Proclamation § 1(c), the United States does not need foreign governments to provide information to grant or deny individual visa applications. It is individual applicants, and not

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[26] *Id.* at 381-444 (listing terrorist groups and where they operate).

[27] *IRAP*, 883 F.3d at 252.

foreign governments (or even the U.S. government), who bear the burden to produce information showing their eligibility for a visa. The United States government has no obligation to obtain this information on its own, and may exclude any individual who fails to meet this burden. 8 U.S.C. § 1361. The government makes no assertion that consular officers are not enforcing this burden of proof. Publicly available evidence indicates that they do enforce this law and have reacted to the changing conditions in each of the Designated Countries on an individualized basis. For the past eight years, the B visa refusal rate (the share of applicants denied a business and/or tourism visitor visa for any reason) for the Designated Countries has been an average of 65 percent higher than for all other nationalities.[28]

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[28] U.S. Dep't of State, *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf (***Dep't of State, Visa Refusal Rate***) (last visited Mar. 9, 2018); U.S. Dep't of State, *Visitor Visa*, https://travel.state.gov/content/visas/en/visit/visitor.html (last visited Mar. 9, 2018).

Table 1: B Visa Refusal Rate (% of Applicants) by Country[29]

Country	2010	2011	2012	2013	2014	2015	2016	2017
Chad	59	43	44	36	32	34	43	52
Iran	39	31	38	48	42	39	45	59
Libya	14	31	39	34	34	43	41	46
North Korea	23	8	36	29	56	48	15	55
Somalia	70	67	62	66	52	65	64	76
Syria	28	33	42	46	60	63	60	59
Yemen	54	48	48	44	44	54	49	61
Venezuela	18	16	12	14	15	16	40	43
Average[30]	***38***	***35***	***40***	***40***	***42***	***45***	***44***	***56***
All other countries[31]	*26*	*25*	*24*	*25*	*25*	*26*	*27*	*29*

These denial rates reflect in part the existing availability of documentary evidence from visa applicants. While the average visa denial rate for all

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[29] Dep't of State, *Visa Refusal Rate*. All figures have been rounded to the nearest whole number.

[30] Average based on the simple arithmetic mean of the data for the eight countries shown in the table and not weighted by number of applicants.

[31] Average based on the arithmetic mean of the data for all countries, excluding the eight shown in the table; data includes stateless persons.

other countries has remained relatively constant in recent years, the average denial rate of the eight Designated Countries increased from approximately 38% to 56% between 2010 and 2017—an increase of almost 50%. In particular, the conflicts in Libya and Syria coincided with refusal rates that more than doubled. *See supra* Table 1. These rejections demonstrate that consular officers can respond to changing circumstances without a blanket ban and that they do enforce applicants' burden of proof. If the government does not need information from foreign governments to "adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA," Proclamation §1(c), then there is no need for a categorical ban; the fact that *some* applicants cannot provide information to confirm their identity cannot justify a "finding" that entry by *any* national of the Designated Countries would be detrimental to this country.

C. The Entry Ban Would Not Have Prevented the Entry of Any Terrorists Since 9/11.

The Proclamation declares that individualized "vetting is less reliable when the country from which someone seeks to emigrate exhibits significant gaps in its identity-management or information-sharing policies, or presents risks to the national security of the United States," Proclamation § 1(h)(ii), yet the government itself does not even attempt to indicate how these "gaps"—however defined—have, in fact, made individualized vetting from these countries less reliable.

The Entry Ban would not have prevented the entry of any terrorist who received a visa since 9/11

and who carried out—or even planned to carry out—an attack in the United States.[32] This is no surprise because the available evidence indicates that very few terrorists have entered the United States since 9/11, when Congress began to revamp the individualized vetting system. Since October 2001, only eight foreign-born persons entered the United States on immigrant or nonimmigrant visas and were convicted of planning or carrying out a terrorist attack on U.S. soil or were killed during such an attack.[33] None of the seven nationalities that these

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[32] David Bier, *New Travel Ban Would Not Have Prevented the Entry of Any Terrorists Since 9/11*, CATO INSTITUTE: CATO AT LIBERTY (Sept. 25, 2017), https://www.cato.org/blog/new-travel-ban-wouldve-prevented-entry-no-terrorists-911 (reporting findings based on a review of the terrorist information provided by the Department of Justice National Security Division, the Department of Justice website, the George Washington University Program on Extremism, and the New America Foundation International Security Program). For the purpose of this section, "carrying out a terrorist attack" is defined as being convicted of, of killed during, a terrorist attack in the United States. The 9/11 hijackers themselves were not nationals of the Designated Countries.

[33] *See* tables 3-4, David Bier, *Very Few Immigration Vetting Failures of Terrorists Since 9/11*, CATO INSTITUTE: CATO AT LIBERTY (Aug. 31, 2017), https://www.cato.org/blog/very-few-immigration-vetting-failures-terrorists-911 (***Bier*, Few Vetting Failures**) (last updated March 13, 2018). According to Cato's internal records, as of the date of this brief this number has not changed. These eight foreign-born persons include self-admitted terrorist Sayfullo Saipov, who was injured while killing eight people in New York City in October 2017. The eight individuals were: Umar Abdulmatallab (Nigeria), Khalid Aldawsari (Saudi Arabia), Ulugbek Kodirov (Uzbekistan), Tashfeen Malik (Pakistan), Ahmed Mohamed (Egypt), Quazi Nafis (Bangladesh), Sayfullo Saipov (Uzbekistan), and Hosam Smadi (Jordan).

eight attackers represent are subject to the Entry Ban.[34]

Moreover, current visa vetting procedures have been effective at preventing the admission of radicalized terrorists. Since October 2001, only six of the above eight terrorists radicalized prior to entry,[35] meaning that—at worst—consular officers failed to identify one terrorist out of every 19.3 million visa approvals between 2002 and 2016.[36] And of these six, the only one who killed anyone on U.S. soil was a Pakistani national, Tashfeen Malik.[37] In other words,

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[34] *See id.*

[35] *See id.*

[36] *See* U.S. Dep't of State, *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts, Fiscal Years 2002-2006*, https://travel.state.gov/content/dam/visas/Statistics/FY06AnnualReportTableI.pdf (last visited Mar. 19, 2018); U.S. Dep't of State, *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts, Fiscal Years 2007-2011*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20I.pdf (last visited Mar. 19, 2018); U.S. Dep't of State, *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts, Fiscal Years 2012-2016*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableI.pdf (last visited Mar. 19, 2018). This figure of one out of every 19.3 million would be even smaller if 2017 data was included.

[37] Bier, *Few Vetting Failures*. *See also* Pat St. Claire, Greg Botelho & Ralph Ellis, *San Bernadino shooter Tashfeen Malik: Who was she?*, CNN (Dec. 8, 2015), http://www.cnn.com/2015/12/06/us/san-bernardino-shooter-tashfeen-malik/index.html. Although Sayfullo Saipov killed eight people in New York City in October 2017, he radicalized after entering the United States, and so was not a vetting failure. *See* Mark Berman & Matt Zapotosky, *Investigators probe New York attack suspect's communications while Trump calls for death penalty*, WASH. POST (Nov. 2, 2017),

the approximately 116 million visa approvals from 2002 to 2016 resulted in only a single visa vetting failure leading to deaths in the United States.[38] Moreover, those deaths would not have been prevented by the Entry Ban since neither Pakistan nor any of the other countries represented by attackers who radicalized prior to entry are Designated Countries.[39]

Historical evidence, therefore, lends no support to the claim that preventing the entry of nationals from the Designated Countries will reduce a significant terrorist threat. Although circumstances may change in the future, the government provides no evidence, and does not even argue, that any threat posed by individuals entering from the Designated Countries has increased or otherwise changed. Indeed, the Proclamation states that it did not select Designated Countries based on intelligence regarding future plans to conduct attacks inside the United States, but rather factors related to identity and information sharing procedures (and, in some cases, terrorist activity inside or near the country of origin). Proclamation § 2. Moreover, the President justified his order to carry out the study that led to the Entry Ban with evidence relating exclusively to past terrorist infiltrations. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 § 1(h) (Mar. 6, 2017). This suggests that the government also considers the past the best

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https://www.washingtonpost.com/news/post-nation/wp/2017/11/02/investigators-probe-new-york-attack-suspects-communications-while-trump-calls-for-death-penalty.

[38] Bier, *Few Vetting Failures*.

[39] *Id.*

predictor of future threats, and the past indicates that the Entry Ban fails to target those threats.[40]

D. Nationals of the Designated Countries Have Not Committed Any Deadly Terrorist Attacks.

The government's selection of the Designated Countries is not based on any meaningful national security risk when viewed in light of the "terrorist attacks and other public-safety threats" suggested by the Proclamation. Proclamation § 1. To the contrary, there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism or other crimes on U.S. soil. There is, therefore, no supported justification or rationale for the Entry Ban.

Table 2 provides the number of deaths and the historical probability of death on U.S. soil by (a) U.S.-born or unidentified attackers, (b) foreign-born nationals from countries other than the U.S. and the Designated Countries, and (c) foreign-born nationals from the Designated Countries. Based on data from

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[40] As required by section 11 of Executive Order 13,780, DHS and the Department of Justice recently released a report on threats posed by international terrorism. U.S. Dep't of Homeland Security & U.S. Dep't of Justice, *Executive Order 13780: Protecting the Nation From Foreign Terrorist Entry Into the United States, Initial Section 11 Report* (Jan. 16, 2018), https://www.justice.gov/opa/press-release/file/1026436/download. The report does not support the Proclamation, as the government implicitly acknowledges by not referencing it in its briefs. In addition, because the report acknowledges that it does not include "aggregated statistical information pertaining to the timing of individual radicalization," it is also irrelevant to assessing whether the Entry Ban's restrictions would have been effective at preventing terrorist attacks in the United States if they were in place earlier. *Id.* at 7.

1975 through October 31, 2017, the annual probability of death in an act of terrorism committed by other foreign nationals (category (b)) was 1 in 3.8 million.[41] During this time, *no one* has been killed in a terrorist attack on U.S. soil by nationals from any of the eight Designated Countries (category (c)).[42]

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[41] Alex Nowrasteh, *The Halloween Terror Attack in New York: The Threat from Foreign-Born Terrorists*, CATO INSTITUTE: CATO AT LIBERTY (Oct. 31, 2017), https://www.cato.org/blog/halloween-terror-attack-new-york-threat-foreign-born-terrorists.

[42] Cato has calculated terrorism deaths based on reviews and analyses of data found in several publicly available data sources, including: the University of Maryland's *National Consortium for the Study of Terrorism and Responses to Terrorism Global Terrorism Database*, http://www.start.umd.edu/ (detailing terrorism incidents, including names, dates, and numbers of deaths from 1975 to 2016 (but not including 1993)); the *RAND Database of Worldwide Terrorism Incidents*, https://www.rand.org/nsrd/projects/terrorism-incidents.html (detailing the same, including for 1993); data from the U.S. Dep't of Justice, *Introduction to the National Security Division's Chart of Public/Unsealed International Terrorism and Terrorism-related Convictions from 9/11/01 to 12/31/15* (Aug. 26, 2016), https://object.cato.org/sites/cato.org/files/wp-content/uploads/dojterrorismrelatedconvictions2015.pdf (describing terrorism convictions); Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INSTITUTE POLICY ANALYSIS 1 (Sept. 13, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf (collecting data and describing foreign-born terrorist attackers); and Cato's internal records (for data on terrorist attacks from January to October 31st, 2017). A list of deadly terrorists and related statistics based on Cato's analysis of this data can be found at: Alex Nowrasteh & David Bier, *A List of Deadly Terrorists*, CATO INSTITUTE (Nov. 16, 2017), https://object.cato.org/sites/cato.org/files/wp-content/uploads/cato_a_list_of_deadly_terrorists.pdf. Annual chance of death was calculated according to the methodology used in Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, 798 CATO INSTITUTE POLICY ANALYSIS 1, 2-4 (Sept. 13,

Table 2: Risk of Death by Terrorism by Nationality, 1975-2017[43]

(a) U.S. Citizen and Unknown	411	1 in 28 million
(b) Non-U.S., Non-Designated Countries	3,037	1 in 3.8 million
(c) Designated Countries	Zero	Zero

The Proclamation also specifically singles out immigrant visa applicants (those who would receive legal permanent residency upon entry), barring all such applications from six countries while allowing some nonimmigrants (temporary visitors, such as students) from all but two countries. Proclamation § 2. National security considerations cannot justify these distinctions. Indeed, evidence dictates the opposite conclusion: as Table 3 highlights, nonimmigrants (*e.g.*, tourists, students, and those with fiancée visas) caused 87 percent of all terrorism deaths from 1975 to 2017, and immigrants (*e.g.*, Green Card holders) caused one half of one percent.

2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf, which derived the chance of death using the analysis described above and census data.

[43] *See* n. 42, *supra*.

Table 3: Annual Chance of Being Killed in an Attack on U.S. Soil, Based on Immigration Status of Terrorist, 1975-2017[44]

Nonimmigrant (tourist, student, fiancé visas)	3,003	87.1%	1 in 3.9 million
Immigrant visa (permanent resident)	16	0.5%	1 in 723 million
Other foreign entry	18	0.5%	1 in 642 million
U.S. Citizen or Unknown	411	11.9%	1 in 28 million

The Proclamation also determines that the Designated Countries' nationals pose a "public safety threat." *See* Proclamation § 1(c). Again, neither the Proclamation nor the government's brief presents any evidence to serve as a basis for this conclusion. Data from the U.S. Census Bureau, however, support the opposite inference: nationals of Designated Countries are much less likely to be threats or become threats to the nation. Specifically, individuals from each nationality subject to the Entry Ban are less likely to be incarcerated than U.S.-born persons.[45]

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[44] *See* methods described in n. 42, *supra*.

[45] Alex Nowrasteh, *There Is No Public Safety Justification for the "Travel Ban"*, CATO INSTITUTE: CATO AT LIBERTY (Oct. 8, 2017), https://www.cato.org/blog/there-no-public-safety-or-criminal-justification-travel-ban (deriving statistics based on U.S. Census Bureau's American Community Survey, available at

As Table 4 shows, people from Designated Countries as a group are about half as likely to end up incarcerated in the United States as those from other foreign countries. U.S.-born persons are about five times more likely to be incarcerated as those born in the Designated Countries. This evidence indicates that people from Designated Countries are much less likely to commit the types of serious crimes that result in incarceration than nationals from other countries.

Table 4: Incarceration Rates by Country of Origin, Ages 18-54, 2015[46]

Incarceration Rate	0.32%	0.59%	1.54%

Contrary to the Proclamation's claim, therefore, there is no reason to believe that the entry of nationals from the Designated Countries would be detrimental to public safety.

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https://www.census.gov/programs-surveys/acs/data/summary-file.2015.html).

[46] *Id.*

CONCLUSION

Amicus respectfully submits that the Court should consider the foregoing evidence in assessing the statutory and constitutional challenges to the Proclamation and the government's challenge to the preliminary injunction, and should affirm the judgment of the United States Courts of Appeals for the Ninth Circuit.

Respectfully submitted,

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